SHAIFUL IDZAM SULAIMAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[CRIMINAL APPEAL NO: 42A-21-2002]
12 DECEMBER 2003

PUBLIC SERVANTS*: Criminal offence - Bribery and corruption - Police officer convicted under s. 11 Anti-Corruption Act 1997 for receiving money for return of identity card of person released from remand - Presumption that money was corruptly accepted under s. 42(1) of Act - Whether trial judge erred when he failed to disclose how presumption was dealt with - Whether failure of justice occasioned - Whether there was credible corroborated evidence to support offence committed by police officer*

This was an appeal by the appellant against his conviction for an offence under s. 11(a) of the Anti-Corruption Act 1997 ('the Act'). The facts showed that the appellant, an investigating officer with the police force, had the authority to retain an identity card ('IC') of a person under remand. The appellant was said to have agreed to accept a sum of RM500 from the complainant for the return of his IC after the complainant was released from remand in connection with drug related offences. The complainant then lodged a report with the Anti-Corruption agency and the officers therein laid a trap that led to the arrest of the appellant. The trial judge was satisfied that the appellant was an agent within the meaning of the Act and that there was payment and as such he should be convicted. In the present appeal, the main issue was whether the trial judge erred when he failed to address the question of whether the presumption in s. 42(1) of the Act (that the money was presumably corruptly accepted) was rebutted.

Held:

[1] The complainant was not an accomplice. Having reported to the Anti-Corruption Agency, he was a partisan witness. The evidence showed that he had become an informer who had participated in leading to the corrupt payment. (p 137 b-c)

[2] The appellant accepted the money after he returned the IC to the complainant. Returning the IC constituted an act in relation to the appellant's principal's affairs and, as an investigating officer, the appellant was to have returned the IC to the complainant upon his release. It was not material to the prosecution's case to establish that a specified amount was asked for. The question was whether the gift would have been given to or whether it could have been effectively solicited if the person in question were not the kind of public servant he in fact was. If the answer to that was 'of course not' then the gift had been solicited or given to him in his capacity as a public servant and was a corrupt one. (pp 144 b-e & 148 a-d)

[3] The appellant's suggestion that the money, if taken, would be brought to the appellant's head of department could not be accepted. There was not even an attempt nor an iota of evidence adduced to show that there was such a practice of bringing a 'hadiah' to the head of department. Further, reg. 8 of the Public Officers (Conduct and Discipline) Regulations 1993 states otherwise. (p 148 d-e)

[4] It was true that the trial judge did not make a ruling on the burden that had been shifted on the appellant and that he never stated whether the burden was discharged. But he had used the words "prima facie", "telah dibuktikan", "telah disokong", "mengesahkan", and "disaksikan". Such words revealed that the trial judge did consider the ingredients material to the charge. If there was a failure of justice, it was curable under s. 422 of the Criminal Procedure Code. (p 150 a-b)

[5] There was credible corroborated evidence of the giving to and the accepting by the appellant of the amount of RM500. No legitimate reason had been given for the acceptance of the money. Further, in the appellant's letter that had been submitted for the release of the complainant, the words "dan percakapan dirakam di bawah s. 112 CPC" were deleted. Therefore, the appellant's claim that he had wanted to meet the complainant for the purpose of recording a s. 112 statement could not be true. (p 151 b-d)

[6] There was no failure of justice occasioned on account of the trial judge's failure to record more details in evaluating the evidence. With regard to sentence, since the appellant was a first time offender the sentence of twenty-four months' imprisonment was substituted with a sentence of eighteen months. (p 151 d-f)

[Appeal dismissed, subject to substitution of period of imprisonment.]

Case(s) referred to:
Attan Abdul GHani v. PP [1970] 2 MLJ 143 ***(refd)***
Chean Siong Guat v. PP [1969] 2 MLJ 63 ***(refd)***
De Silva v. PP [1964] MLJ 81 ***(refd)***
HKSAR v. Lam Tze Yim [1998] 2 HKC 30 ***(refd)***
Kong Kam Piu & Anor [1973] HKLR 120 ***(refd)***
Mohamed Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Ng Kok Lian v. PP [1963] 2 MLJ 379 ***(refd)***
Pie Chin v. PP [1985] 1 MLJ 234 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim [1999] 2 CLJ 215 HC ***(refd)***
PP v. Datuk Hj Harun Idris (No 2) [1977] 1 MLJ 15 ***(refd)***
PP v. Ishak Hj Shaari & Ors Appeals [2003] 3 CLJ 843 CA ***(refd)***
PP v. Yuvaraj [1969] 2 MLJ 89 ***(refd)***
R v. Kong Kam Piu & Anor [1973] HKLR 120 R v. Mills 68 Cr App R 154
R v. Osbourne [1905] KB 557 ***(refd)***
R v. Wellburn 69 Cr App R 254 ***(refd)***
Rattan Singh v. PP [1971] 1 MLJ 162 ***(refd)***
Teja Singh & Mohamed Nasir v. PP [1950] 16 MLJ 71 ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
The Attorney General of Hong Kong v. Ip Chiu & Anor [1980] HKLR 11 ***(refd)***

Legislation referred to:
Anti Corruption Act 1997, ss. 11(a), 42(1), 44(1)(a), (b)
Criminal Procedure Code, ss. 117, 422
Evidence Act 1950, ss. 114, 133
Prevention of Corruption Act 1961, ss. 4(a), (2), 13(3), 14(1), 17, 18(1)

Other source(s) referred to:
Phipson on Evidence, 8th edn, p 478

For the appellant - Terence Naidu; M/s WK Kok & Co
For the respondent - Amir Hadi Abdul Hadi DPP

Reported by Usha Thiagarajah

JUDGMENT

Heliliah Mohd Yusof J:
The appellant was convicted of an offence under para. (a) of s. 11 of the Anti Corruption Act 1997 (1997 Act). There were several grounds of appeal but these grounds all appear to have stemmed from the way in which certain issues have been addressed by the learned Sessions Court Judge. The mainstay of the arguments of the appellant was that there were misdirections particularly on the standard of proof in relation to the application of s. 42(1) of the 1997 Act that is a statutory presumption. With regard to the grounds of judgment I

observe that it is true that generally the grounds of judgment have not disclosed how certain findings had been arrived at and even then no authorities were cited. However it is also noted that there were facts relevant to the issues that were referred to by the learned judge. I therefore propose to deal with the grounds of judgment under specific headings and they are as follows:

(a) The presumption under s. 42(1) of the Act 1997.

(b) The evidence of witnesses.

(c) The defence.

The Presumption

Under this heading the decision in *PP v. Yuvaraj* [1969] 2 MLJ 89 is relevant since in that case what was under cons deration were ss. 4(a) and 14(1) of the Prevention of Corruption Act 1961 (the 1961 Act). Section 11(a) of the 1997 Act is in *pari materia* with s. 4(2) of the 1961 Act while s. 42(1) of the 1997 Act is in similar terms with s. 14 of the 1961 Act. Lord Diplock in delivering the judgment of the Privy Council observed:

> Where a defendant is charged with an offence under section 4(a) of the Prevention of Corruption Act 1961, to which section 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence *viz.* (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, *viz.* (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed "unless the contrary is proved."
>
> This appeal turns solely upon the construction of these words "unless the contrary is proved."
>
> The third ingredient which is to be presumed to exist unless the contrary is proved is a "fact" within the definition of that word in the Evidence Ordinance. That Ordinance provides in section 2 that it "shall apply to all judicial proceedings in or before any court" with certain exceptions which are not material to the present case."

In the present appeal the prosecution sought to establish that the appellant at the material time, is an officer in the employment of a public office and that as an agent within the meaning of the 1997 Act has accepted or obtained a gratification since the meaning of gratification includes "money". According to the Record of Appeal at the end of the case for the prosecution the learned Deputy Public Prosecutor in the course of his submission referred to *PP v.*

Yuvaraj, supra, and did state that at that stage of the proceedings the burden of proof on the prosecution was to establish a *prima facie* case. Having referred to *PP v. Yuvaraj* the Deputy Public Prosecutor also referred to *Attan bin Abdul Ghani v. PP* [1970] 2 MLJ 143 where he cited excerpts from the judgment of Sharma J (as he then was) the relevant passage of which is as follows:

> Once it is proved that the gratification has been paid or received then in the words of section 14 of the Act "Such gratification shall be deemed to have been paid or given or received corruptly ..." The presumption at once arises under the section. This presumption is a presumption of law and it is obligatory on the court to raise it in every proceeding for an offence under section 3 or 4 of the Act provided it is proved that the gratification had been paid, given or received. The prosecution has not to establish anything more than the payment of money (See *State of Madras v. Vaidyanatha Iyer* and *Emden v. State of Uttar Pradesh*). It then becomes the duty of the accused to disprove what section 14 begins to presume against him. For what is the degree of proof required of the accused see *Rex v. Carr-Briant*, *Saminathan v. Public Prosecutor* and *Otto George Gfella v. The King*. The presumption cannot be said to have been rebutted without sufficient evidence, ie, such evidence as is reasonably sufficient to invite belief in its probable truthfulness. It was very strongly urged that as the defence was one of non-receipt of the money there was no onus on the appellant to prove "the contrary" suggested in section 14. The argument is fallacious because the presumption comes into operation only when the factum of payment is proved as it was to the satisfaction of the learned president in this case. If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary.

It is observed that Sharma J used the word "proved" in relation to the gratification that has been received. The other aspect of Sharma's J judgment is also his elaboration in a summary form on the question of corroboration which I wish to allude to later. The prosecution presented the facts briefly as follows:

(a) The appellant agreed to accept RM500 from SP7 (who is also the complainant) for the purpose of returning P22 the identity card of SP7.

(b) SP3 testified that SP7 had been arrested in connection with drug related offences and had been in police custody with the appellant as the investigating officer.

(c) According to SP4 the appellant as the Investigating Officer had the authority to retain an identity card of a person who is under remand and upon SP7's arrest his case was handled by the appellant P6, p. 18 A-E.

(d) SP4 also testified that once a person is released from custody after the period of remand the identity card or (IC) is to be returned. However the IC was apparently not returned immediately to SP7.

(e) The alleged offer or negotiations between the appellant and SP7 are said to have taken place during the course of several telephone calls, one of which was recorded at the Anti Corruption Agency Office.

(f) Based on a report lodged by SP7 a trap was laid by the Anti Corruption Agency and a time determined for SP7 and the appellant to meet. This was arranged during a telephone call from the BPR office, a transcript of which was produced in evidence by the defence – exh. D21.

(g) At the place arranged for the meeting to take place the appellant went up to a car bearing the registration number WEB 7789 in which SP14 was seated as a passenger. SP14 testified that he saw SP7 giving the trap money P13-1 to the appellant.

(h) Subsequently when SP15, an officer with the Anti Corruption Agency arrested the appellant, the trap money was found in the possession of the appellant.

The prosecution did rely on the presumption under s. 42(1) of the Act and also dwelt on the question of the evidence of an accomplice and made references to the question of corroboration.

At the end of prosecution's case the learned Sessions Court Judge made a ruling that a *prima facie* case was established and called for the defence to be entered.

It is now necessary to consider the grounds of judgment. The grounds appear to be in a narrative form, narrating a factual matrix of the events that had transpired. However the judge did state the following:

> Di akhir kes pendakwaan pendakwa perlu membuktikan satu kes *prima facie* terhadap kesemua ingredien tuduhan.
>
> Di dalam kes ini ingredien yang perlu dibuktikan oleh pendakwa adalah seperti berikut:
>
> (a) Tertuduh adalah seorang ejen kerajaan-kerajaan iaitu seorang Inspektor Polis yang bertugas di Ibu Pejabat Polis Daerah Dang Wangi, Kuala Lumpur.
>
> (b) Tertuduh telah pada 27.8.99 jam lebih kurang 4.55 petang dalam kereta WEB 7789 menyetuju terima wang RM500 daripada Chen Hon Seng (pengadu) untuk memulangkan kad pengenalannya setelah pengadu dibebaskan dari tahanan untuk satu kes yang di siasat oleh tertuduh.

From the above the grounds of judgment it would appear that the judge was satisfied that appellant is an agent within the meaning of the Act and secondly that it was established that there was the fact of payment. At that stage the judge was therefore adhering to the factual ingredients propounded in *PP v. Yuvaraj (supra)*.

The grounds of judgment did not disclose how the third ingredient was dealt with. The third ingredient in the words of Lord Diplock "is to be presumed unless the contrary is proved is a fact within the definition of that word in the Evidence Ordinance."

In the present appeal the words "unless the contrary is proved" is also in question since the prosecution's case also rests on the presumption. Learned counsel for the appellant contends that the judge has failed to address the issue and as such it amounts to a misdirection in law. The operation of the presumption is again explained in *PP v. Yuvaraj* which does appear to be the *locus classicus* now in relation to the onus that lies upon the defendant in criminal proceedings where a statutory presumption (ie, s. 14 of the Act 1961) has been invoked in a corruption case. The rational which has a bearing on the present case is the following:

> The policy which underlies section 14 of the Prevention of Corruption Act 1961 is, in their Lordships' view, clear. The section is limited to person "in the employment of any public body". No similar presumption applies to agents of private principals. Corruption in the public service is a grave social evil which is difficult to detect, for those who take part in it will be at pains to cover their tracks. The section is designed to compel every public servant so to order his affairs that he does not accept gift in cash or in kind from a member of the public except in circumstances in which he will be able to show clearly that he had legitimate reasons for doing so.

The specific question that was addressed by the Privy Council was determined as follows:

> The burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable is understood as meaning 'the burden of resulting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given corruptly as an inducement or reward as mentioned in s. 3 or 4 of the Prevention of Corruption Act 1961.

The finding of the judge at the end of the case was extremely brief. If he had intended to be concise, it has now resulted in the appellants contending that the conviction should be set aside and substituted with an acquittal and discharge.

The main grounds of appeal are therefore that there are serious misdirections in law not only on the question of the burden of rebutting the presumption but also on the question whether the appellant did accept or obtain money "corruptly" and this in turn depends on the question of the evidence of SP7 who not only being the person who gave the money was also the person who lodged a report. The question of corroboration and the creditability of certain witnesses were therefore also raised.

Before addressing those questions however I propose to refer to the evidence in three parts as follows:

(a) The first part relates to those preceding the lodging of a report by P7 at the Anti Corruption Agency (ACA) and this is connected to the question of the application of a presumption.

(b) The second part which relates to the lodging of the report as a consequence of which the ACA held a briefing and laid a trap. This part concerns the question of the evidence of witnesses.

(c) The third part which relates to the place where the money is said to have been received or accepted and this relates to the defence.

The First Part Raises The Following Question

The complainant/SP7: Is he an accomplice?

This question whether SP7 should be regarded as an accomplice has been brought about as a result of the conflicting testimony given both by SP7 and the appellant. It could be likened to the "chicken and egg" question as to which came first on account of the evidence given. The circumstances which gave rise to the conflict appear to originate right from the time when the appellant was released after being remanded in custody for an investigation in connection with drug related activities. Evidence was adduced that the complainant was released under s. 117 of the Criminal Procedure Code on 26 August 1999 after having been arrested on 12 August 1999. It was also in evidence that SP7 was also right from the outset, concerned or anxious about retrieving his identity card. On this aspect the evidence led by the prosecution was that it is indeed the normal procedure to have the identity card returned to a suspect upon his release from police custody. This aspect was in fact particularly borne out during the stage of the cross-examination of SP3 and SP4. There seems to be however an inconsistent practice whether, upon the return of the card, a record is made of it or not and if so where. Nevertheless, what is not disputed is that the IC is to be returned.

The next material fact to note is that at the end of the trial the evidence of SP5 indicated that SP7 was restless (gelisah) and anxious about the return of the identity card and his conduct showed that he was persistent on the matter. This is borne out by the following passage:

> Pada 26.8.99 saya ada bawa tahanan ke Mahkamah waktu pagi. Saya escort 4 tahanan dari Balai Dang Wangi ke Mahkamah. Sepanjang pagi selepas ambil tahanan saya ada di Mahkamah. Sebelah tengahari saya bawa 3 tahanan ke Mahkamah Juvana. Semasa tengahari I.O. Insp. Shaiful (OKT) – saya tak pasti saya boleh cam tahanan yang saya bawa ke Mahkamah. Daripada 3 – 1 dituduh, 2 dibebaskan. Yang 2 dibebaskan saya boleh cam mereka. Saya tak boleh ingat nama-nama mereka yang dibebaskan.
>
> OKT yang mengendalikan dokumen bagi pelepasan kedua-dua tahanan tersebut. Semasa itu tidak ada orang datang jumpa saya. Saya ada cakap dengan 2 orang yang dibebaskan. Saya tanya kenapa kamu gelisah, tahanan kata takut ditangkap semula. Itu sahaja perbualan saya yang tahanan gemuk itu gelisah. Tahanan gemuk ini juga tanya tentang I/Cnya. Saya cakap I/C ada dengan I.O. Tahanan gemuk tanya macam mana hendak ambil. Saya kata saya akan tanya Insp. Shaiful (OKT). Tahanan ini tanya macam mana nak hubungi Insp. Shaiful (OKT). Saya kata telefon pejabat atau handphonenya. Selepas itu saya jumpa Insp. Shaiful (OKT) dan tanyakan tentang I/C tahanan dan boleh tak bagi nombor handphone. Insp. Shaiful suruh beri nombor handphone. Sekarang saya tak boleh ingat nombor handphone. Selepas itu saya telah bagi nombor handphone kepada lelaki Cina gemuk tersebut. Selepas itu lelaki Cina terus keluar.

The person described as "lelaki Cina gemuk" is SP7. The evidence of SP5 showed that it was during the time of the release of SP7 from custody that the mobile phone number of the appellant was given to SP7. SP7 himself affirmed that he did obtain the mobile phone number 019-3214373. From this stage onwards the conflict of evidence commenced. The evidence of SP7 asserted that when he requested for the return of the IC he was told by the appellant to see the latter at his office at 3pm on the same day. And according to the version of SP7 instead of going to the office he made a telephone call and his account of the conversation was as follows:

> Saya tanya OKT jika saya pergi jumpa kamu apa barang-barang harus saya bawa. OKT kata "mesti maulah faham-faham". Ia kata mestilah faham-fahamlah. Saya faham dengan perkataan itu ialah duit iaitu OKT mahu duit.

The appellant's version of that stage of the evidence is as follows:

> Selain dari suruh Chen datang ke pejabat (s) ambil IC saya tidak kata apa-apa yang lain. Chen telefon saya dan dalam percakapan tersebut ingin mengambil kad pengenalan. Ia ada memperkenalkan diri – saya tidak ingat apa lagi yang dikatakan.

From the above what was confirmed was that the appellant did request that SP7 should go to his office to collect the IC, that SP7 did call him about the IC but the appellant could not recall anything else. At that stage of the evidence it is not certain whether the suggestion that "money" had to be given in exchange for the return of the IC was at the instance of appellant or that it was SP7 who initiated an offer and if so as a perpetrator.

The next stage is to consider the evidence in respect of the events that transpired on the following day namely 27 August 1999. Before SP7 lodged his first information it was alleged that a phone call was made from a public phone to the appellant's mobile phone, where SP7 stated in examination in chief that he spoke again to the appellant to ask for his IC and also informing the appellant as follows:

> Saya nak balik IC sekarang. Macam mana ambil. Saya cakap saya sudah standby duit RM500.00 lebih, bolehkah ambil balik IC. Dia tanya saya berapa. Selepas itu saya kata RM500.00 lebih. Dia kata okaylah, okaylah.

With respect to the aforementioned telephone call the appellant during cross-examination admitted that he did receive a call from SP7 but the appellant's version was that SP7 called only for the purpose of stating the reasons why he could not go to the office and the rest of the conversation was denied.

Again at this stage of the proceedings the denials of the appellant made it appear as though SP7 was the one making the offer as the version of the appellant was that nothing was mentioned about the money but there was again a mention about the IC.

At this juncture the decision in *Ng Kok Lian v. Public Prosecutor* [1963] 2 MLJ 379 is to be considered. Learned counsel for the appellant has referred to the case for the purpose of s. 18 of the Prevention of the Corruption Act 1961 which provides:

> 18 Notwithstanding any rule of law or written law to the contrary, no witness shall in any such trial or inquiry as is referred to section 17 be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

It is to be noticed that s. 18 of the 1961 Act is to be applied specifically in the context of s. 17 of the 1961 which pertains to evidence in circumstances of the case that where an accused person is in possession of pecuniary resources or property disproportionate to his known sources of income or he had obtained an accretion to pecuniary resources or property for which he cannot

satisfactorily account, that fact may be used to corroborate the testimony of any witness in a trial against an accused person in any trial for an offence under the Act.

So as it was then, the use to which s. 18 of the 1961 Act could be applied has also to be examined in the context in which s. 17 itself was being applied in respect of an offence. If s. 17 could be made applicable only then would the provision of s. 18 be attracted. It concerns therefore the question of the creditworthiness of a giver who has himself paid or someone else on his behalf has made a payment of any gratification to an agent or member of a public body. The other noticeable fact about the previous s. 18 is that the nomenclature "accomplice" is not used in that section.

In my view compared to s. 18 of the 1961 Act, the new s. 44(1) of the Act 1997 is wider in scope and has been extended to several other categories of persons besides the giver. Again however the use to which the section is to be put is for purposes of the treatment of the evidence. The change from s. 18 of the 1961 Act to s. 44(1) of the Act compels me to dwell on certain passages in the judgment delivered by Salleh Abas CJ (as he then was) in *Ng Kok Lian*'s case. To my mind, what was stated by the learned judge then has been given (it is not known whether intentionally or unintentionally) statutory recognition. The relevant passage that I wish to cite relates to the part where the learned judge traced the history of s. 18(1) of the Act in which he described it as the re-enactment of s. 13(3) of the Prevention of Corruption Ordinance 1950 which was wholly replaced by the 1961 Act. The discussion in that case was clearly on a rule of presumption in the context of the evidence of a person who may be an accomplice. However what is interesting to note is that Salleh Abas FCJ in that case went on to a lengthy discourse on the issue of an accomplice and the excerpts of his judgment that I wish to cite is as follows:

> We have traced the history of the provision and analysed its effect upon the existing law as to the accomplice's evidence at length. This is done for no other purpose than to show that the provision does not change the law as to accomplice's evidence at all. The limited modification or an exception referred to by Taylor J is nothing more than a legislative design to obviate the practical difficulties which the prosecution used to encounter prior to the passing of the 1950 Ordinance because of the ever increasing readiness of the courts to hold a giver of a bribe to be an accomplice irrespective of the circumstances in which it was given. This provision, therefore, serves as a reminder to the courts of their duty to examine the evidence of the witness who gives the bribe closely before arriving at a decision that he is an accomplice, and not to automatically apply the rule as to an accomplice's evidence as was done by the Kuala Langat magistrate in *Public Prosecutor v. Hajl Ismail & Anor. (supra).*

As a receiver of a bribe is not within the provision, surely his credibility should be judged in the same way as that of a giver prior to the enactment of the provision in 1950. In any case even after the provision was passed, it being only a limited modification, and the rule as to accomplice's evidence not being abolished, we cannot see any reason why a witness to whom a bribe is given should be less believed than his counter-part, the giver. It is for this reason, we think, that Syed Sheh Barakbah J thought that it made no difference whether the witness is the receiver or the payer; the central question being always whether he is an accomplice, irrespective of the part he played in the transaction. The court must therefore approach his evidence in the same way and not come to an automatic conclusion as in *Hajl Ismail*'s case *(supra)* that he is an accomplice just because counsel said so. There can be no automatic application of the rule as the accomplice's evidence to any witness nor could a witness be *prima facie* an accomplice without first examining his evidence to find out whether he is an accomplice or not; least of all to be held an accomplice just because money was given to him or because he received it.

To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the giver. Only then would the receiver be regarded as particeps criminis. This means that just as the giver as a principal offender requires *mens rea*, so does an accomplice witness who received the gratification. If he received the gratification innocently or without any corrupt motive or if he did not receive it at all, although it was given to him, as far as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention. Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus*. The whole idea is completely contrary to the basic concept of criminal liability.

A cursory examination of decided cases in Malaya and Singapore clearly shows that the question whether a receiver is an accomplice or not depends entirely upon the facts of the particular case.

I find that the analytical reasoning in that judgment appears to have crystallized into legislative language in the form of s. 44(1)(a) and (b) of the 1997 Act. The provisions of that section are:

44. (1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act:

(a) no witness shall be regarded as an accomplice by reason only of such witness having:

(i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;

(ii) given, promised, offered or agreed to give any gratification; or

(iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

(b) no agent provocateur, whether he is an officer of the Agency or not, shall be presumed to be unworthy of credit by reason only of his having attempted to commit, or to abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and

(c) any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgment to the need to warn itself against the danger of convicting on such evidence.

The specific feature about s. 44(1) is where the words used in para. (a) of s. 44(1) is that "no witness shall be regarded as accomplice". Paragraph (b) of the same sub-s. (1) is worded differently that is "no agent provocateur whether he is an officer of the agency or not, shall be presumed to be unworthy of credit by reason only of his having ...". Surely with such differences in wording some significance has to be attached to such different usage of words. In the context of s. 44(1)(a) the word "regard" is to be given its ordinary meaning and it means to "look upon" or "consider". The word "regard" therefore is entirely different from "shall be presumed" or "shall not be presumed". The next aspect of s. 44(1) itself is that the section begins with the words "Notwithstanding any written law or rule of law to the contrary ..."

The law in Malaysia which deals with the evidence of an accomplice is found in s. 114 illustration (b) and s. 133 of the Evidence Act 1950. The inception of s. 44(1) is not, in my view, intended to introduce a radical change in the law. However as expressed above, the judgment of Salleh Abas CJ elucidates the approach that a witness for the prosecution is not to be labelled as an accomplice automatically. Since in a bribery case there has to be a giver and a receiver the facts and circumstances of each case will have to be carefully scrutinized in order glean what role each one has contributed in perpetrating

what appears to be a form of illegal bargain since s. 11(a) itself refers to a gratification "as an inducement or reward for doing or forbearing". Hence both the giver or receiver of the gratification cannot automatically be regarded as accomplices as if so it would render the whole object of s. 11(a) of the 1997 Act sterile. In the present appeal since the appellant as receiver is being charged, therefore with regard to s. 44(1) of the 1997 Act the evidence of the prosecution has to be viewed in the context of s. 44(1) sub-para. (a)(ii), (iii) and (b) and (c).

With regard to SP7 I find it necessary to cite certain parts of the judgment of Syed Agil Barakbah J (as he then was) in *Rattan Singh v. Public Prosecutor* [1971] 1 MLJ 162.

> The main ground of appeal was whether PW1, the main witness to the charge on which the appellant was convicted, was an accomplice and whether as such he came under the protection of section 18 of the Prevention of Corruption Act. The learned president in his grounds was of the view that it was too early a stage to treat PW1 as an accomplice considering the frame of mind that he was in, and that mere concurrence short of some actual participation in the crime was only indicative of an intention to participate. This he concluded was not envisaged by the provision of section 18 which, he said, provides certain amount of latitude in the admission of evidence of a person who would otherwise have been an accomplice, without corroboration. He relied on the dictum of Foster Sutton CJ in *Daimon bin Banda v. Public Prosecutor* which discussed the effect of section 13 of the Prevention of Corruption Ordinance 1949, and agreed with the ruling Taylor J made in the court of first instance. Now, section 13 of the old Ordinance is substantially in *pari materia* with section 18 of the Act. Section 18 reads:
>
> > Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.
>
> Though the word "accomplice" does not appear, this section modifies the law and practice not as to accomplices generally, but only as to a specified class of accomplices so that a witness who is an accomplice only by reason of making a corrupt payment is not presumed to be unworthy of credit. (See *Soosay Dass v. Public Prosecutor*). If, however, he has played a more active part in the transaction apart from the bare payment, he is not protected by the section and the ordinary rules as regards accomplices apply. (See *Daimon bin Banda v. Public Prosecutor, supra*). Considering the parts played in the case by PW1, in the circumstances there was no doubt that his action went beyond concurrence, because after concurring, he went to see his two colleagues, PW2 and Mahadevan, and suggested that each of them should raise

the money to pay the appellant to which they all agreed. He did not make a report until after PW2 had told him that he (PW2) had already done so. In other words, he was quite prepared to bribe the appellant and negotiated with PW2 and Mahadevan on the matter. In my view, this amounted to an infamous conduct and therefore he was an accomplice in the real sense of the word. The learned president therefore misdirected himself when he concluded that it was too early a stage to treat PW1 as an accomplice.

It was urged by the learned deputy public prosecutor that PW1 was an agent provocateur rather than an accomplice on the ground that prior to the commission of the offence he acted as agent for the Anti-Corruption Agency to set a trap for the appellant. He relied on *Lionel de Silva v. Regina*, a Singapore case, in which a crown witness who acted as agent for the police admitted that previously he had been a party to the bribing of police officers and was held not to be an accomplice. I agree fully with the decision but the position is not the same here because PW1 was an accomplice in the early stages of the transaction. There are many authorities on the matter but the principle is best illustrated in *Regina v. Mullins* where Maule J said at page 530:

> Barrett and Baldwinson, on the other hand, were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices.

This case was decided in England in which there were four witnesses whose character was considered. Two were police spies from the start and undoubtedly not accomplices. Barrett and Baldwinson were originally conspirators but Barrett informed the police only after arrests and Baldwinson did so before arrests were made.

Rattan Singh's case is a simple illustration that in that case PW1 was regarded as an accomplice as not only did he negotiate to raise the money to pay the appellant but unlike PW2 he made the report only after PW2 had done so.

In *Teja Singh & Mohamed Nasir v. Public Prosecutor* [1950] 16 MLJ 71 Spenser Wilkinson J had referred to both English and Indian cases and gave the views as follows:

I think the law is correctly stated in the case of *Emperor v. Chaturbhuj Sahu* where the head note reads as follows:

> A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong doers or **before the actual perpetration of the offence** is not an accomplice but a spy, detective

> or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. **But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.**

In the judgment in this case the following passage appears to me to be of practical value in distinguishing between accomplice and spy:

> It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy; but we think, that the line may be drawn in this way: If the witness has made himself an agent for the prosecution, before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.

After considering the various authorities cited I am content to follow the statement of the law on this point made by Maule J in his summing-up in the case of *Rex v. Mullins*:

> An accomplice confesses himself a criminal and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, maybe an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration. (emphasis added)

In the present appeal before me it has been urged on behalf of the appellant that SP7 is the one who was actively offering the bribe in view of the denial of the appellant that he had uttered the words "mesti maulah faham-faham" and "mestilah faham-fahamlah". In the circumstances of the present case SP7 on the following day after the alleged incident lodged the report at the Anti Corruption Agency. The report P11 does not establish the fact that the appellant did make such a request but rather it shows a consistency of conduct on the part of SP7 that he was concerned that his IC was not returned. It has of

course been suggested in cross examination that the idea of offering the money to the appellant emanated from SP5 but even so since the appellant was still in possession of the IC, something which was not controverted, the record shows that there was a form of pressure on SP7, causing him to identify the appellant and not SP5 as the person to whom the money is to be given. It is arguable of course that SP7 could fall within the category of a witness described in s. 44(1)(a)(iii) that is as being a person who has been in any manner concerned in the commission of the offence. Nevertheless in my view SP7 having reported to the Anti Corruption Agency is a partisan witness for while it could not be said here that he raised the money that was alleged to be given to the appellant, SP7 is not an accomplice in the sense explained in *Teja Singh*'s case. On the evidence he transformed himself into an informer and participated in the next stage leading to the payment. SP7 was therefore an interested witness.

This brings me therefore to the second part of the evidence that is the evidence leading to the meeting at the certain car park of Jalan Stadium. Before doing so it is noted that the judgment of the Sessions Court Judge did not specifically address the question of the status of SP7 that is whether he is an accomplice or otherwise. What he stated in the grounds was:

> Keterangan pengadu yang la telah meminta balik kad pengenalan di sokong oleh keterangan SP5 iaitu Kpl. Mustaffa yang telah membawa pengadu ke Mahkamah untuk dibebaskan. SP5 mengesahkan pengadu ada meminta kad pengenalan dan SP5 telah memberikan kepada pengadu nombor telefon bimbit tertuduh.

However with regard to the statement "keterangan pengadu mengenai permintaan wang oleh tertuduh disokong oleh laporan BPRnya", without any reason being given is in my view misconceived as SP7 cannot be corroborating his own oral testimony with what he stated in the report. As I have observed earlier P11 is consistent only with his conduct that he was anxious about the return of the IC which was being held by the appellant.

The Second Part Of The Evidence And The Question Of Witnesses

This part of the evidence relates to the role of SP14 and the officers of the Anti Corruption Agency (the ACA) who also had a role in the third part of the evidence that is the handing over of the money by SP7. The officers of the Anti Corruption Agency are SP9, SP12, SP13 and SP15.

In his evidence SP14 stated:

> SP7 suruh menjadi saksinya kerana seorang Inspektor minta RM20,000.00 for the IC of SP7.

According to the record after SP14 and one Lim Teng Suan were brought to ACA headquarters a telephone conversation made by SP7 to the appellant was recorded by the ACA. There was some variation as to when this phone call was made, that is, after or before the briefing that was given by the Ketua Cawangan Khas Abu Zubir bin Matfodz which was attended by SP9, SP12, SP13, SP14 and SP15. With regard to the telephone conversation that was recorded, it was not disputed that a place was fixed for a meeting with the appellant for the return of the IC. SP7 stated "saya tak boleh ingat secara detail tetapi adalah tentang di mana menemui dan menyerah wang". When the appellant gave evidence he averred that no mention was made about money. The transcript of the conversion that was recorded also registered that at that point of time no mention was made about the money.

It is clear that the briefing or "taklimat" that was given by the Ketua Cawangan Abu Zubir bin Mahfodz was attended by SP7, SP9, SP12, SP13, SP14 and SP15. All these witnesses including SP7 were present during the operation where the money was handed over to the appellant and with the whole exercise at the car park being what is properly termed as "entrapment". In this respect it would appear that Malaysian law has recognized not only the admissibility of the evidence of trap witnesses but also to rely on the evidence for corroboration.

It was also in *Teja Singh*'s case that Spenser-Wilkinson J made references to Boscoe's Criminal Evidence and Phipson on Evidence and said in the course of his judgment:

> Sir Roland stated that he could find no reference to agents provocateurs in the English text books and suggested that the reason for this was that the evidence of such persons was never used in England. I find, however, the following passage in *Roscoe's Criminal Evidence*, 15th Edition p. 156:
>
> > Agents provocateurs, spies, informers, detectives & etc. not accomplices. Such persons employed in entrapping criminals 'are entirely distinguished in fact and in principle from accomplices', per Maule J., Mullins, 3 Cox C.C. 526: spy on Chartists, 1848; 'and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators'. Followed in Bickley 2 Cr. AR.. 63; 73 J.P. 239; 53 S.J. 402,1909: woman police spy noxious drug.
>
> The following passage also appears in *Phipson on Evidence*, 8th edn p. 478:
>
> > The rule requiring the corroboration of accomplices does not apply to two classes of accomplices: (a) Informers – ie, persons who have joined in, or even provoked, the crime as police-spies (*R v. Bickley*, 73 J.P. 239; or the police, who have assented thereto, *R v. Heusen* 6 Cr. App. R. 76);

The head-note to the case of *Rex v. Bickley* referred to in the above extracts reads as follows:

> The evidence of a police spy or agent provocateur not that of an accomplice and does not require corroboration.

It appears from the extract above quoted that the learned author of Roscoe's Criminal Evidence classed agents provocateur in the same category as spies, informers and detectives. I have no doubt that there may be witnesses in any of these categories who may be wholly unworthy of credit but in my view the credit of any such witness depends upon the facts of each particular case and not upon the particular label which can be attached to him.

What Constitutes Corroboration?

Chong Siew Fai CJ (Sabah & Sarawak) in *Thavanathan a/l Balasubramaniam v. Public Prosecutor* [1997] 3 CLJ 150 (SC):

In the celebrated case of *R v. Baskerville* [1916] 2 KB 658, Lord Reading CJ expressed the requirements of corroborative evidence thus (at page 667):

> ... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute ... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

Sharma J in *Attan bin Abdul Gani*'s case, *supra*, summarized aspects of the evidence that constitute corroboration. Its summary is extensive and it would suffice to extract the following:

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.

(4) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

In the present appeal I find SP9, SP12, SP13 and SP15 and even SP14 were all at and around the car park at the instance of their Department the ACA and for purposes of trapping. They were not obtaining evidence by committing the offence of receiving or giving gratification but they were there laying a trap to see whether an offence was being committed. Prior to the entrapment only SP7 had been acquainted with the appellant.

Again at the point it is noted that the judge did not make any reference to the participation of SP7, SP9, SP12, SP13, SP14 and SP15. His reference to the evidence of these witnesses are "Pemberian wang perangkap kepada tertuduh telah disaksikan oleh SP14 kawan pengadu yang berada dalam kereta bersama pengadu dan termasuk lelaki itu. Pemberian wang perangkap juga di sokong oleh keterangan pegawai BPR yang telah merampas wang itu daripada tertuduh yang telah ditangkap di tempat kejadian".

The principal argument against this part of the evidence is consequently on the question of corroboration. If SP7 is a partisan witness the question of the circumstances under which the appellant "received" the money hinges on the evidence of SP14.

In *Chean Siong Guat v. PP* [1969] 2 MLJ 63, Abdul Hamid Omar J (as he then was) observed:

> Discrepancies may, in my view, be found in any case for the simple reason that no two persons can describe the same thing in exactly the same way. Sometimes what may appear to be discrepancies are in reality different ways of describing the same thing, or it may happen that the witnesses who are

> describing the same thing might have seen it in different ways and at different times and that is how discrepancies are likely to arise. These discrepancies may either be minor or serious discrepancies. Absolute truth is I think beyond human perception and conflicting versions of an incident, even by honest and disinterested witnesses, is a common experience. In weighing the testimony of witnesses, human fallibility in observation, retention and recollection are often recognized by the court. Being a question of fact, what a magistrate need do is to consider the discrepancies and say whether they are minor or serious discrepancies. If, after conthem. On the other hand, if a magistrate finds that the discrepancies do not detract from the value of the testimony of the witness or witnesses, it would then be proper for him to regard the discrepancies as trivial and ignore them. On the other hand, if a magistrate finds that the discrepancies relate to a material point which would seriously affect the value of the testimony of the witness or witnesses, then it would be his duty to weigh the evidence carefully in arriving at the truth.

In *Mohamed Radhi bin Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 Jemuri Serjan CJ (Borneo) as he then was, opined:

> In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt.

In the present appeal the evidence of SP6, SP12, SP14, SP15 are relied upon by the prosecution to support the evidence of SP7. If SP7 is a partisan witness as in this case he turned himself into an informer and then also an agent provocateur by being the payer in the case the principal argument of the defence was corroboration. If SP7 is to be considered an interested or partisan witness SP9 in his evidence was the person who gave the marked notes to SP7, who said "tempat lengang", who saw a male Malay getting into the car and was the witness who said he identified himself to the appellant before the appellant made the dash.

SP15 was the witness who stated "taklimat diadakan berdasarkan aduan" and that the place for the meeting was at the suggestion of the Agency. SP15 was also the witness who testified that he saw a Malay male getting into the car in which were waiting SP7, SP14 and their friend in car No. WEB 7789. SP15 was the witness who said that the money (later identified as the same trap money) was taken out of the pocket of the same Malay male whom he saw getting out of the car.

SP13 saw a Malay male getting into the left-hand side of the passenger seat and saw him getting out. He said he saw SP9 "cuba menghalang" the Malay male and saw the latter running away with SP6 hot on his heels. SP13 later retrieved the IC from SP7. SP13 was the person responsible to examine whether SP7 had on him an identity card before the entrapment.

SP12 testified that he also saw SP9 chasing a Malay male and witnessed the same person taking out money from his pocket. In so far as these four witnesses are concerned, bearing in mind that they had not been associated with the Malay male concerned, their evidence showed that they made a positive identification of the person they saw namely the appellant.

SP14 who was in the car with SP7 testified *inter alia*

> Dalam masa perjalanan ke Stadium, saya tidak tahu ada apa-apa berlaku. Selepas sampai di Stadium kereta saya di letak di tempat letak kereta di Stadium Merdeka. Kemudian SP7 memanggil anggota polis melalui hand-phone. Setelah panggilan ada seorang polis hampiri kereta saya dan minta duduk dalam kereta. Saya duduk di sebelah tempat pemandu. Lelaki Melayu ada duduk dalam kereta di belakang saya. Saya ada lihat wajah lelaki tersebut (dicam sebagai OKT).
>
> OKT tanya wang itu di mana, SP7 tanya adakah ia akan ditangkap semula selepas wang diserahkan dan OKT kata ia tidak akan ditangkap semula. SP7 kemudian tanya mana kad pengenalannya. Kemudian SP7 menyerah wang dalam tangan kananya kepada OKT dan OKT menggunakan tangan kanan itu ambil wang. Setelah wang diserah OKT dan SP7 turun dari kereta.
>
> In cross examination SP14 said in response to a question "saya cadangkan SP7 kata ini 'duit belanja'.
>
> Tidak.
>
> SP7 ambil wang itu dari poket seluarnya tanpa ada sampul dan beri kepada OKT. SP7 ambil wang dari poket seluar.

Before proceeding to deal with the evidence of SP14 it is necessary to mention a specific argument raised by counsel with respect to SP14.

> Jika diteliti keterangan SP14 iaitu:
>
> (a) Beliau memberi keterangan dalam Mandarin.
>
> (b) Beliau diberitahu oleh pengadu wang yang diminta ialah ialah RM20,000.00.
>
> (c) Semasa menghadiri taklimat BPR berkata "tujuan menangkap ialah kerana polis itu minta RM20,000.00.

(d) Taklimat dijalankan oleh pegawai-pegawai BPR berbangsa Melayu. Tiada keterangan ianya dijalankan dalam bahasa lain selain dari bahasa kebangsaan. Mahkamah diminta mengambil judicial notice bahawa taklimat kerajaan adalah pada lazimnya dijalankan dalam bahasa kebangsaan.

(e) SP14 jelas tidak boleh faham langsung apa yang berlaku pada taklimat iaitu taklimat berkenaan wang RM500.00 bukan RM20,000.00 sebab jumlah wang yang disebut dalam taklimat tersebut adalah RM500.00. Jika di pandang dari segi bahasa adalah suatu angka sahaja dan bukan mudah dikelirukan kecuali penguasaan Bahasa Malaysia beliau adalah begitu lemah untuk membezakan 500 dengan 20,000. Beliau hanya mempunyai angka RM20,000.00 dalam fikirannya. Dalam hal ini 2 inferens berlainan boleh diandaikan iaitu sama ada angka ini diperolehi benar-benar dari SP7 ataupun sememangnya beliau tidak tahu apa sebenarnya yang diberitahu oleh SP7 dan apa yang berlaku pada taklimat, maka kebolehpercayaan keterangan SP14 adalah suspek.

(f) Dari hakikat ini adalah mustahil beliau boleh faham perbualan antara SP7 dan perayu dalam kereta.

(g) Keterangan pengadu mengenai apa yang berlaku dalam kereta WEB 7759 pada 27.8.1999 berlainan dari keterangan SP14.

(h) SP14 juga kata beliau lihat pengadu berikan wang dengan tangan kepada pemohon yang mengambil dengan tangan kanan.

(i) SP14 duduk di hadapan pemohon di dalam sebuah kereta jenis WIRA. Adalah tidak mungkin beliau boleh lihat ini berlaku di dalam kedudukan demikian.

On record the cross examination in respect of SP14's evidence was surprisingly brief. This is a challenge of the evidence of a witness which is based not on what is on record but only by way of a mere submission. Counsel for the appellant had also the opportunity but it was not done to test the proficiency or otherwise of SP14. During the trial nowhere is it registered that the defence had raised it in cross examination.

The obligation rests with the defence to establish that SP14 could not have possibly understood anything bearing in mind that during the trial an interpreter is available. I do not glean anything from the records that the effort was made. I find therefore that this argument is to be rejected and in doing so I find support from the decision of Wan Yahya J (as he then was) in *Pie bin Chin v. Public Prosecutor* [1985] 1 MLJ 234, 236 and *Jucho bin Sadikan v. Perbadanan Kemajuan Ekonomi Negeri Johore* [1996] 3 MLJ 627.

SP14's evidence therefore confirmed that the trap money passed hands from SP7 to the appellant in the car. I note that counsel for the appellant also disputed SP14's evidence on the ground SP14 may not have understood the amount that was supposed to have been given. With due respect again this is not borne out in the records and only raised by way of submission. This practice should be frowned upon especially if such tactics are used to cloud the issue of creditworthiness. With SP14's evidence it was therefore "proved" that the appellant "accepted" money because the money was given upon the return of the IC. Returning the IC constitutes an act in relation to his principal's affairs and as an investigating officer, the IC was to have been returned to SP7 upon his release on 26 August 1999 by the appellant.

Certain arguments have been raised about the amount of money that is alleged to have been solicited. The amount of RM20,000 alleged to have been paid by SP7 appears to be a form of exaggeration by SP7 himself for reasons best known to himself and I do not wish to speculate what the reasons are. Nevertheless while in some cases it may be necessary to establish specified amounts were asked for and given, in cases such as the present appeal, it is not material to the prosecution's case to establish that a specified amount was asked for as in cases such as this, it will always be impossible to establish a case against the receiver as it will always be possible for the person who accepts it to say that he has never requested the amount he has actually accepted. As per Gill J (as he then was) in *De Silva v. Public Prosecutor* [1964] MLJ 81, 83 (HC) said:

> Discrepancies and contradictions there will always be in any case. In considering them what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy.

Augustine Paul J (as he then was) in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim* [1999] 2 CLJ 215 (HC) also held:

> The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v. Sitaram* AIR 1936 PC 60). It must, however, be observed that being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors. v. Public Prosecutor* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go far (see *Khoon Chye Hin v. Public Prosecutor*

[1961] MLJ 105. It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy (see *De Silva v. Public Prosecutor* [1964] MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v. State of Bihar* AIR [1965] SC 277). It is useful to refer to *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at page 19:

> ... In my opinion, discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened ... The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted (see *Public Prosecutor v. Mohamed Ali* [1962] MLJ 257).

The Sessions Court Judge in his judgment stated:

> Tertuduh dalam pembelaannya telah mengesahkan kesemua keterangan yang diberikan oleh pengadu kecuali keterangan pengadu yang tertuduh ada meminta wang untuk pemulangan kad pengenalan.

In concluding his finding he added:

> Saya telah meneliti keterangan tertuduh dan saya dapati ia adalah satu pembelaan "bare denial" yang tidak dapat saya mempercayai. Saya juga dapati pembelaan gagal menimbul sebarang keraguan munasabah dalam kes pendakwaan.

This is the very finding which according to counsel constitutes a misdirection. Oddly enough if it were to follow the decision in *Radhi*'s case what the judge considered a burden of proof seemed to impose a lighter burden than the burden expected of the appellant that is the burden of discharging the presumption on a balance of probabilities.

The defence does consistently show that there is denial on the question of a demand of money or any discussion on the amount of money. The question here is what is the meaning of "corruptly" and "gratification". Both words are not defined in the Act. The Concise Oxford Dictionary lists out the meanings as "remunerate", "fee", make present usually of money to", "bribe". The word "corrupt" inter alia means "rotten", "depraved", "wicked", "bribe". In *Public Prosecutor v. Datuk Haji Harun bin Idris (No. 2)* [1977] 1 MLJ 15 Raja Azlan Shah FJ (as he then was) said of the word "corrupt":

"Corrupt" means "doing an act knowing that the act done is wrong, doing so with evil feelings and evil intentions" (see *Lim Kheng Kooi v. Reg*) and "purposely doing an act which the law forbids" (see *R v. Smith*). In *R v. Wellburn* 69 Cr. App. R 254 Lawton J:

> Corruptly is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposely doing an act which the law forbids as tending to corrupt.

In *R v. Mills* 68 Cr. App. R 154 Geoffrey Lane LJ said, although in obiter:

> ... nevertheless we feel it right to say that in our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe. By accepting it as a bribe and intending to keep it he enters into a bargain despite the fact that he may make to himself a mental reservation to himself that he is not going to carry out his side of the bargain. The bargain remains a corrupt bargain, even though he may not be intending to carry out his intended corrupt act. Such a private determination avails him no more than would a private determination that a similar payment in respect of past favours was received by him because of innocent matters other than a past favour.

I find that there are several instances when the appellant in the present, whether in the course of cross-examination, not only merely denied the evidence of the prosecution but also gave different reasons for taking the money. One of the instances was where it was imputed that it was SP3 who instilled the idea of asking for the money. This is what I find in evidence, *inter alia*, that is the following:

> Kamu kata kepada Chen lain kali hendak buat dadah, pandai-pandai sikitlah'.
>
> Tidak setuju.
>
> Saya tahu Kpl. Mustafa yang dimaksudkan oleh Chen kerana sepanjang masa hanya Kpl. Mustafa ada dengan Chen. Chen tidak sebut nama Kpl. Mustafa. Saya tak setuju itu anggapan saya. Saya boleh menerima hadiah yang diberi

oleh Chen. Saya akui ia adalah salah tetapi masih saya terima. Setelah keluar dari kereta saya masuk dalam poket baju. Saya ada terangkan kepada suspek kenapa mahu dia naik ke pejabat iaitu ambil rakaman percakapan. Saya tidak ingat ada tanya tentang Thomas Tai.

Oleh kerana saya anggap sebagai hadiah saya tidak kira wang tersebut. Wang itu ada dalam sampul. Saya tahu kereta Chen melalui perbualan dalam telefon dan dalam telefon saya tidak minta imbuhan. Saya bukan pergi ke kereta untuk mengambil wang tersebut.

From the above one need only to ask the question what exactly is the reason for which the money was taken since it was taken. This is where what has been decided in *R v. Osbourne* [1905] KB 557 is useful, that is, where the accused in his attempt to rebut the presumption takes several stands, the very multiplicity of the stands destroys the *bona fide* of them and they become inadequate to rebut the presumption.

I turn now to a particular case in Hong Kong in which a particular test has been applied. The test which was first propounded by *Kong Kam Piu & Anor*. [1973] HKLR 120 was applied by the Privy Council in *The Attorney General of Hong Kong v. Ip Chiu & Anor.* [1980] HKLR 11 and was considered in *HKSAR v. Lam Tze Yim* [1998] 2 HKC 30. The head notes in the last case reads:

The applicant, an off-duty sergeant in the marine police, was charged with 11 offences relating to the acceptance of an advantage for using his status and position as a public officer to prevent unlawful interference in the conduct of two private business establishments, contrary to s. 4(2)(a) of the Prevention of Bribery Ordinance (Cap. 201). The prosecution adduced no direct evidence to prove the purpose of the payment received by the applicant, instead they called a number of witnesses in order to establish an inference that the payments had been given as a reward for the applicant acting as a 'protector' in his capacity as a police officer.

Two of the appellate court judges in that case agreed to the "test" which is found in the judgment. The test is: "In *A-G of Hong Kong v. Ip Chiu and Anor*. [1980] HKLR 11, the Privy Council approved the test to be applied in cases brought under s. 4(2) of the Ordinance which was propounded by Leonard J in *R v. Kong Kam Piu & Anor*. [1973] HKLR 120. The facts in *Kong Kam Piu* are unimportant save that they related to the solicitation of gifts, unlike the application presently before us which is concerned with the acceptance of advantages".

The passage cited by Lord Edmund-Davies (at 16 in the *Ip Chiu* case) reads:

> Here the vital words are "in his capacity as a public servant" ... It becomes, I consider, clear that the word "capacity" cannot be intended to bear the narrow [*36] meaning which [appellants' counsel] would have me assign to it ... As I see it the question which one must ask oneself when considering the corruptness of a gift given to or solicited by a public servant in order to induce him to abstain from a proposed course of action is: '*Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was?' If the answer is 'Of course not' as it is in this case then the gift has been solicited or given to him in his capacity as a public servant and is a corrupt one* ... The present Ordinance aims at the mischief of a police officer obtaining a gift from a member of the public for forbearing to act in a manner which would be embarrassing to that member of the public whether or not he be entitled (by virtue of his office) to do the act forborne, provided of course that the embarrassment sought to be avoided by the gift could not equally easily have been caused by the police officer had he not been a police officer.

I am of the view that such a test as propounded is of value to be similarly considered here. I also find it extremely deplorable that there was a suggestion during the appeal that the money, even if taken would be brought to the appellant's head of department. There is not even an attempt, not an iota of evidence adduced that there is such a practice of bringing a "hadiah" to the head of department. The iniquity of such an argument is in fact the very reason that the Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993, Peraturan 8 provides:

> 8. Hadiah, dsb.
>
> (1) Tertakluk kepada peruntukan peraturan ini, seseorang pegawai tidak boleh menerima atau memberi, atau tidak boleh membenarkan isteri atau suaminya atau mana-mana orang lain menerima atau memberi bagi pihaknya, secara langsung atau tak langsung, apa-apa hadiah (sama ada dalam bentuk zahir atau selainnya) daripada atau kepada mana-mana persatuan, badan, orang atau kumpulan orang jika:
>
> (a) penerimaan atau pemberian hadiah itu mempunyai kaitan, dengan apa-apa cara, dengan perlaksanaan tugas awam pegawai itu; dan
>
> (b) bentuk, amaun atau nilai hadiah itu tidak sepadan dengan maksud hadiah itu diberikan.
>
> (2) Ketua Jabatan boleh membenarkan seseorang pegawai menerima surat pujian daripada mana-mana persatuan, badan, orang atau kumpulan orang sempena persaraan atau pertukarannya dengan syarat bahawa surat pujian itu tidak terkandung dalam bekas yang bernilai.

(3) Ketua Jabatan boleh membenarkan pungutan sumbangan secara spontan oleh pegawai-pegawai di bawahnya bagi maksud membuat sesuatu penyampaian kepada seseorang pegawai dalam jabatannya sempena persaraan, pertukaran atau perkahwinan pegawai tersebut atau perkahwinan anak pegawai tersebut atau sempena apa-apa upacara lain yang sesuai.

(4) Jika:

(a) seseorang pegawai berasa ragu-ragu tentang sama ada bentuk, amaun atau nilai hadiah yang diterima olehnya adalah sepadan dengan maksud hadiah itu diberikan; atau

(b) hal keadaan menyebabkan sukar bagi seseorang pegawai untuk menolak sesuatu hadiah atau cenderamata yang bernilai, yang penerimaannya dilarang oleh peraturan ini, maka hadiah itu boleh diterima secara rasmi tetapi pegawai itu hendaklah dengan seberapa segera yang praktik, mengemukakan suatu laporan bertulis kepada Ketua Jabatan yang mengandungi perihalan lengkap dan anggaran nilai hadiah dan dalam hal keadaan yang hadiah ini diterima.

(5) Apabila diterima laporan yang dibuat di bawah subperaturan (4), Ketua Jabatan hendaklah memutuskan sama ada:

(a) untuk membenarkan pegawai itu menyimpan hadiah itu; atau

(b) untuk mengarahkan supaya hadiah itu dikembalikan kepada pemberinya melalui Ketua Jabatan.

(6) Bagi maksud peraturan ini, Ketua Jabatan ertinya Ketua Setiausaha sesuatu Kementerian atau ketua jabatan di peringkat ibu pejabat, mengikut mana-mana yang berkenaan.

The genuine way in which a gift is given is well described by Raja Azlan Shah FJ in the *Datuk Hj. Harun Idris* case, *supra*, as follows:

In ordinary circumstances the presentation of a donation be it by way of cheque or otherwise is preceded by certain formalities, for example, a representative of the donor firm would personally hand it to the donee at a proper place in the presence of witnesses; not in some "back alley". I am quite sure that the donor wants to be present to show that he is participating in whatever worthy cause the donee is undertaking, be it politics, charity, education or welfare. The donation is then properly presented and properly acknowledged. In the present case the donation was "presented" in a strange way.

Having examined the evidence, it is true that the Sessions Court Judge did not make a ruling on the burden that has been shifted on the appellant and that he never stated whether the burden is discharged. But throughout he did use the words *"prima facie"*, "telah dibuktikan", "telah disokong", "mengesahkan", "disaksikan". Such words to mind reveal that the Sessions Court Judge did consider the ingredients material to the charge. The question is therefore whether there has really been occasioned a failure of justice as alleged by counsel for the appellant. The answer is in s. 422 of the Criminal Procedure Code and the recent decision of *PP v. Ishak Hj. Shaari & Ors. Appeals* [2003] 3 CLJ 843 wherein the Court of Appeal in the judgment of Mohd. Noor Ahmad JCA (as he then was) indicated the following:

> Section 422 of the CPC is couched in comprehensive form. Sub-section (a) of the section only states "any error, omission or irregularity ...". It does not mention "illegality". Be that as it may, as stated by case law, the distinction drawn in many of the cases in India between an illegality and an irregularity is one of 'degree' rather than of 'kind'. To our mind, the non-mention of 'illegality' in the sub-section reflects the wisdom of Parliament in that, the court is given the discretion to decide whether in a particular case any error, omission or irregularity is curable but with the caveat that such error, omission or irregularity has not occasioned a failure of justice. And in the exercise of that discretion it is incumbent on the court to have regard to the promotion of the basic principle on which the CPC is based in the light of case law. Therefore, the errors in the judgments in the form of a misdirection on the standard of proof in these appeals should not be struck down automatically as illegalities, or as it were, by rule of thumb without first considering whether the accused has had a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice and thereafter, to decide whether the misdirection has occasioned a failure of justice otherwise the intention of Parliament in enacting s. 422 is defeated.
>
> But if the trials were conducted substantially in the manner prescribed by the CPC, but some irregularities occurred in the course of such conduct the irregularity could be cured under s. 422 and nonetheless so because the irregularity involved, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the CPC.

Further on his Lordship stated:

> Whatever it is what remains to be considered is whether there is sufficient evidence to support the conviction in a particular case and if there is, that would be a good ground for holding that there was no miscarriage or failure of justice. The same consideration applies to the misdirection at the end of the case. Therefore, we conclude that the misdirection on the standard of proof

in a trial which has been conducted in substantial compliance with the CPC is curable under s. 422 of the CPC provided that there is sufficient evidence to support the conviction, as the error has not occasioned a failure of justice.

In my view there are credible corroborated evidence of the giving to and the accepting by the appellant of the amount of RM500. No legitimate reason has been given for the acceptance of the money and the reasons given are not in the circumstances probable. There is one matter which I wish to observe. The document at p. 152 of the record shows that the appellant submitted an application "untuk membebaskan OKT di bawah s. 117 KPJ". Paragraph 2 of that letter addressed to the magistrate shows:

Oleh itu pohon agar saspek dibebaskan di bawah seksyen 117 KPJ.

The words "dan percakapan dirakam di bawah s. 112 KPJ" were deleted. Yet the appellant maintained that he wanted to see SP7 for purposes of recording a 112 statement. Where then is the truth?

In the final analysis I do not find therefore that there has been occasioned any failure of justice on account of the Sessions Court Judge's failure to record in more details his reasons while evaluating the evidence. I also note that with regard to the sentence the judge has taken into consideration the relevant mitigating factor and has given his reasons for the sentence of imprisonment and the fine that has been imposed.

In the light of the circumstances of the case as explained above I find that the conviction is to be affirmed. With regard to the sentence itself I find the amount of fine that is to be imposed is also affirmed. However since the appellant is a first offender the sentence of twenty four months imprisonment is substituted with a sentence of imprisonment of eighteen months. Subject to this substitution of the period of imprisonment the appeal is dismissed.